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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1035

EDWARD LECCI, individually and as President of the Nassau County Patrolmen's Benevolent Association,
Petitioners,

— against —

WILLIAM CAHN, District Attorney of Nassau County of the State of New York, FRANCIS B. LOONEY, Commissioner of Police Nassau County, State of New York,
Respondents

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals for the State of New York.

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Argument in Opposition to Granting a Writ of Certiorari.

POINT I

Section 426(3) of the Election Law of the State of New York is valid and constitutional.

The entire substance of the complaint served by appellant deals with the alleged unconstitutionality of Section 426(3) of the Election Law of the State of New York. Appellant, prior to this action, instituted an Article 78 proceeding against Francis B. Looney, Commissioner of Police, in which he sought to have Article VI, Rule 14 of the Rules and Regulations of the Nassau County Police Department declared invalid and unconstitutional. Said rule also prohibits participation by police officers in the field of party politics.

Mr. Justice Wachtler, in dismissing the petition, stated in part that policemen are precluded from actively participating in partisan political affairs for fear that the authority and influence with which they are vested by the public could be used unfairly. It was further held that this restriction is not dissimilar in nature or thrust to the Hatch Act as it relates to Federal employees.

The appellant appealed to the Appellate Division of the Supreme Court from the dismissal of the petition. The determination below was unanimously affirmed in a decision, which held in part, that Article VI, Rule 14, comports with sound administration policy, and that the removal of police personnel from active politics, and from active participation in any movement for the nomination or election of candidates for political or public office is conducive to the effective maintenance of discipline, and the preservation, and promotion of the integrity and efficiency of the Police Department and its personnel. *Lecci* v. *Looney* 33 A.D. 2d 916, 307 N.Y.S. 2d 594 (2d Dept. 1970). In effect, that decision held that the exclusion of the police personnel from politics did not abridge their constitutionally guaranteed freedoms of press, speech, assembly and petition. The substance of the decision dealt with the entire subject matter of Section 426(3) of the Election Law of the State of New York.

Although research discloses that no prior cases have been decided by the Courts in New York dealing directly with Election Law §426(3) the restrictions imposed by this section are similar to those imposed by 5 U.S.C.A. §7324 (commonly known as the Hatch Act).

This section provides that "No officer or employee in the Executive branch of the Federal Government . . . shall take an active part in political management or in political campaigning . . ." The Supreme Court of the United States has ruled that the need to protect against the possible evils

of political partisanship justify such legislation, and it is therefore immune from constitutional attack. *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1946).

The present section 426(3) of the Election Law was added in 1965 in place of §756 of the former Penal Law of 1909. The case of *McAvoy* v. *Press Pub. Co.*, 114 App. Div. 540,99 N.Y. Supp. 1041 (1st Dept. 1906) deals with the constitutionality of the predecessor to said section of the Penal Code, now contained in Election Law §426(3). Mr. McAvoy was an active member of a political organization and was appointed Deputy Police Commissioner. The Court observed:

> "The intent of the statute is obvious. It was to keep the police out of active, open participation in party politics and the management thereof ... If he desired to accept the office, his duty was to resign from his political association ... That the policy so indicated is wise, no one will deny. That it is lawful to make such a requirement as an incident of holding the office must be admitted."

In light of the decisions on similar statutes, and the reasonableness of prohibiting policemen from participation in party politics, it is respectfully submitted that §426(3) of the Election Law of the State of New York is constitutional in every respect.

CONCLUSION

For all of the reasons stated above, the decision below should be affirmed.

Respectfully submitted,

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